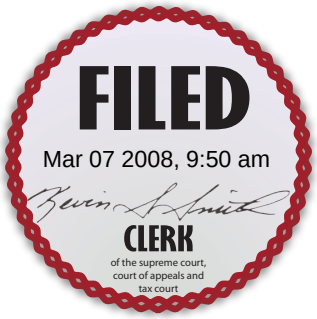

ATTORNEY FOR APPELLANT:

ALEX R. VOILS, JR.
Lebanon, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

JESSICA MEEK
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

GREG WATKINS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0706-CR-00503
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Michael Morrissey, Judge
Cause No. 79D06-0509-FD-00253

March 7, 2008

MEMORANDUM DECISION– NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Greg Watkins appeals his conviction for Operating a Vehicle while Intoxicated Resulting in Serious Bodily Injury,[1] a class D felony, challenging the sufficiency of the evidence. Specifically, Watkins argues that the State failed to prove that Watkins was driving the vehicle that was involved in a crash. Watkins also argues that his sentence must be set aside because the advisory sentence that was imposed violated the rule announced in Blakely v. Washington, 542 U.S. 296, 301 (2004), and that the same prior convictions were used in deciding the sentence to impose on the driving while intoxicated charge and in determining what sentence should be imposed following the finding that he is a habitual substance offender.[2] Finally, Watkins claims that his sentence was inappropriate when considering the nature of the offense and his character. Finding no error, we affirm the judgment of the trial court.

FACTS

Early in the evening of February 27, 2005, Watkins, Loren Farrar, and Hold Buckner drove to a bar in Lafayette in Watkins's truck. All three began drinking, and Farrar told Watkins that he would stop drinking at 9:00 p.m. and be the designated driver. At approximately 10:00 p.m., the three left the bar after Watkins was ejected for fighting. Although the three entered other Lafayette bars, they were refused service because of Watkins's and Buckner's level of intoxication.

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[1] Ind. Code § 9-30-5-4.

[2] Ind. Code § 35-50-2-10.

On the way home, Farrar was driving, Watkins was in the passenger seat, and Buckner was in the back passenger seat. At some point, Farrar stopped at a gas station and when he returned to the truck, Watkins had moved over to the driver's seat and insisted on driving. After arguing for fifteen minutes, Farrar relented and permitted Watkins to drive because he thought he could regain control of the vehicle if necessary from the passenger seat.

As Watkins drove, he sped, ran red lights, and crossed the centerline. At some point, Watkins announced that he needed another drink and jerked the wheel to the left, losing control of the vehicle and striking a telephone pole. Following the crash, Farrar was lying in the road near the vehicle with a compound fracture to his right leg and Watkins was kneeling next to him with a cut on his forehead. Buckner was pinned inside the vehicle in the backseat. The truck's windshield was "spidered" on the driver's side, consistent with someone hitting their head on the windshield, and the front passenger's side wheel was pushed up into the interior of the truck. Tr. p. 17-18.

Deputy Glen Keller of the Tippecanoe Sheriff's Department was dispatched to the crash scene and asked Watkins if he had been driving. Watkins responded that he was involved in the crash, but he did not know who had been driving. Farrar also denied driving the truck.

Thereafter, all three individuals were transported to various local hospitals. Deputy Keller went to the hospital where Watkins was being treated. Watkins was combative with the hospital staff, was slurring his speech, and smelled strongly of alcohol. When Deputy Keller asked Watkins who had been driving at the time of the crash, Watkins became

defensive and responded that Farrar had been "the designated driver" and that was "all he was going to say." Id. at 29. When Watkins was again asked who was driving, he told Deputy Keller "to talk to Farrar." Id. at 312. When Deputy Keller told Watkins that he had nearly killed his two friends, he noticed Watkins's lack of remorse or concern with the condition of the other two men. It was subsequently determined that Watkins had a blood alcohol content of .14, and Farrar's blood alcohol content was .02.

As a result of the incident, Watkins was charged with two counts of operating a vehicle while intoxicated resulting in serious bodily injury, a class D felony, and several other related offenses. The State also alleged that Watkins was a habitual substance offender.

At a bench trial that commenced on February 2, 2007, Farrar testified that Watkins wanted him to say that he was driving, but he refused to do so. Buckner claimed that he did not remember much about the evening, but he believed that Farrar had been driving at the time of the accident. Following the presentation of evidence, Watkins was found guilty of one count of operating a vehicle while intoxicated resulting in serious bodily injury and found to be a habitual substance offender.

On March 2, 2007, Watkins was sentenced to eighteen months on the operating charge, which was enhanced by six and one-half years on the habitual substance offender count.[3] At the hearing, the trial court explained to Watkins that "You now have four OWI convictions, '88, '89, '91, the instant offense." Sent. Tr. p. 42. In sum, Watkins received an

[3] No convictions or sentences were imposed on the remaining counts, as the trial court determined that "the other counts [had] merge[d]." Tr. p. 205.

aggregate sentence of eight years, with one year suspended to probation and two years to be served in community corrections. He now appeals.

DISCUSSION AND DECISION

I. Sufficiency of the Evidence

Watkins first challenges the sufficiency of the evidence. Specifically, Watkins argues that his conviction must be set aside because the State failed to prove beyond a reasonable doubt that he was the driver of the vehicle at the time of the crash.

When reviewing a challenge to the sufficiency of evidence, we will not reweigh the evidence or judge the credibility of the witnesses, and we respect the jury's exclusive province to weigh conflicting evidence. McHenry v. State, 820 N.E.2d 124, 125 (Ind. 2005). Appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. Id. Expressed another way, we will affirm the defendant's conviction if the probative evidence and reasonable inferences drawn therefrom could have allowed a reasonable trier of fact to find the defendant guilty. Id.

We also note that a conviction may rest entirely on circumstantial evidence. McGary v. State, 421 N.E.2d 747, 751 (Ind. Ct. App. 1981). When circumstantial evidence serves as the basis for a conviction, the evidence need not overcome every reasonable hypothesis of innocence; instead, it need only lead to a reasonable inference supporting the jury's verdict. Id.

At trial, Farrar testified that after the trio stopped at a gas station, Watkins moved into the driver's seat and insisted on driving. Tr. p. 75-76. Following an argument, Farrar

relented and permitted Watkins to drive because he thought that he could reach the steering wheel and take control of the vehicle if necessary. Id. at 76, 92. Farrar also testified that Watkins drove at a high rate of speed, ran red lights, and crossed the centerline. Id. at 78-79. As they approached a road that led to another bar, Watkins stated that he needed another drink. Watkins jerked the wheel, lost control of the vehicle, and struck a telephone pole. Id. at 80.

In addition to this evidence, it was also established that the windshield on the driver's side of the vehicle was "spidered," which was consistent with Watkins's head injuries and no one else's. Id. at 17-18. Deputy Keller spoke with Farrar, who indicated that he was not driving at the time of the accident. Id. at 14. Moreover, Farrar testified that after the crash, Watkins told him to say that he was driving, yet Farrar refused to do so. Id. at 81-85. Also, when Deputy Keller asked Watkins who had been driving at the time of the crash, he told Deputy Keller "to talk to Farrar." Id. at 31.

Buckner testified that he "couldn't remember anything about the accident." Id. However, Buckner acknowledged that Farrar had been driving on the way home both before and after a "stop." Id. at 114. The trial court expressly determined that Buckner's testimony lacked credibility and pointed out various inconsistencies in the testimony. Id. at 204. Moreover, the evidence established that Watkins's aunt had driven Buckner to trial and Buckner rented a house from Watkins. Buckner was "like a brother to Watkins." Id. at 103, 132.

When considering all of the evidence that was presented, we find that there was

sufficient evidence for the trial court—as the factfinder—to conclude that Watkins was operating the vehicle when the crash occurred. In essence, Watkins's argument amounts to an invitation that we reweigh the evidence and judge the credibility of the witnesses, which we cannot do. McHenry, 820 N.E.2d at 125. As a result, we conclude that the evidence was sufficient to support Watkins's conviction.

II. Sentencing

Watkins also contends that he was improperly sentenced. Specifically, Watkins argues that the sentence must be set aside because the trial court identified the same prior convictions as an aggravating factor when imposing the sentence on the driving while intoxicated charge as it did when imposing an enhanced sentence on the habitual substance offender count. Moreover, Watkins claims that the trial court erroneously identified prior arrests that had not been reduced to convictions as an aggravating factor in violation of the rule announced in Blakely. Finally, Watkins contends that the sentence was inappropriate when considering the nature of the offense and his character because "he has led a long period of law-abiding time. He has a family, home, and business." Appellant's Br. p. 12.

A. Alleged Blakely Violation and Improper Aggravating Factors

We initially observe that Watkins was sentenced under Indiana's new sentencing scheme, which replaced "presumptive" sentences with "advisory" sentences. Robertson v. State, 871 N.E.2d 280, 283 (Ind. 2007). Under the post-Blakely statutory scheme, a trial court may impose any sentence that is authorized by statute and permissible under the Indiana Constitution "regardless of the presence or absence of aggravating circumstances or

mitigating circumstances." Weaver v. State, 845 N.E.2d 1066, 1070 (Ind. Ct. App. 2006), trans. denied; Ind. Code § 35-38-1-7.1(d).

In this case, Watkins received the advisory sentence of eighteen months for operating a vehicle while intoxicated causing serious bodily injury, a class D felony. When a trial court orders a defendant to serve an advisory sentence, it is not required to set forth its reasoning for imposing such a sentence. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). Thus, we reject Watkins's claim that the trial court improperly identified an aggravating factor to "enhance" the sentence. Appellant's Br. p. 10-11.

Even so, to the extent that the trial court may have considered Watkins's criminal history at sentencing, such is a valid aggravating factor. Morgan v. State, 829 N.E.2d 12, 15 (Ind. 2005). And, contrary to Watkins's contention, allegations of prior criminal activity need not be reduced to convictions in order to be considered a proper aggravating factor. Bacher v. State, 722 N.E.2d 799, 804 (Ind. 2000). Moreover, juvenile adjudications are proper sentencing considerations for the trial court. Ryle v. State, 842 N.E.2d 320, 321 (Ind. 2005).

In this case, the record demonstrates that Watkins has a prior juvenile adjudication for theft and numerous adult convictions including burglary, a class B felony. Watkins also has four prior convictions for theft, a class D felony, disorderly conduct, a class B misdemeanor, three convictions for public intoxication, a class B misdemeanor, possession of marijuana, a class A misdemeanor, several driving while intoxicated-related offenses, and dealing in marijuana. Appellee's App. p. 3-5. Moreover, at the time of sentencing, there were several

unrelated charges pending against Watkins, including maintaining a common nuisance, neglect of a dependent, and possession of marijuana. Tr. Sent. Tr. p. 42.

Contrary to Watkins's claim, the convictions used to support the habitual offender count were not also used as aggravating factors. Indeed, the trial court judge explicitly identified certain "qualifiers" for the habitual substance offender enhancement, which included a driving while intoxicated conviction on March 23, 1990, a driving while intoxicated conviction on March 6, 1992, and a dealing in marijuana conviction on August 23, 1990. Tr. p. 217-18. As noted above, Watkins's criminal record is far more extensive than the three convictions that the trial court relied upon at sentencing. Hence, the trial court could properly identify Watkins's criminal history as an aggravating factor even after excluding those three convictions. See Prickett v. State, 856 N.E.2d 1203, 1209 (Ind. 2006) (holding that a defendant's criminal history alone is sufficient to justify an enhanced sentenced).

In addition, we reject Watkins's claim that the trial court was precluded from identifying his criminal history as an aggravating factor when it sentenced him on the habitual offender count. Indeed, we have determined that the habitual offender finding is a status offense, does not have a presumptive sentence, and does not require a balancing of any aggravating and mitigating circumstances. Goodall v. State, 809 N.E.2d 484, 486 (Ind. Ct. App. 2004). The habitual offender sentence enhancement, within the bounds authorized by statute, is strictly within the trial court's discretion. Lewis v. State, 800 N.E.2d 996, 999 (Ind. Ct. App. 2003). Moreover, any challenge to the length of the habitual offender

enhancement must be made within the context of a claim that the sentence was inappropriate. Goodall, 809 N.E.2d at 486. Thus, Watkins's claim fails.

B. Appropriateness

Watkins also maintains that the sentence must be set aside when considering the nature of the offense and his character. In reviewing a challenge to a sentence under Appellate Rule 7(B), we defer to the trial court. Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

We turn first to the nature of the offense. In accordance with Indiana Code section 35-50-2-7 "[a] person who commits a class D felony shall be imprisoned for a fixed term of between six (6) months and three (3) years, with the advisory sentence being one and one-half (1 ½) years." With regard to the nature of the offense, the advisory sentence is the starting point that the legislature has selected as an appropriate sentence for the crime committed. Childress, 848 N.E.2d at 1081.

In this case, Watkins received the advisory sentence for operating while intoxicated, a class D felony, which was enhanced by six and one-half years for being a habitual substance offender. The evidence established that Watkins, while highly intoxicated, placed himself behind the wheel of a vehicle and refused to move. Watkins argued with Farrar for nearly fifteen minutes until Farrar finally conceded and permitted him to drive. Tr. p. 34, 65, 75, 76. Hence, even though Watkins certainly had measures in place to avoid driving while intoxicated, he chose to reject those measures. Thereafter, Watkins drove recklessly at a high

rate of speed, repeatedly running red lights and crossing the centerline. Id. at 78-79. Then, after stating that he "needed" another drink, Watkins jerked the wheel to the left and crashed the vehicle into a telephone pole, nearly splitting the vehicle in two and inflicting severe injuries on two of his friends and damaging property. Id. at 12, 13, 31, 80. We find that Watkins's nature of the offense argument does not aid his inappropriateness claim.

In examining Watkins's character, the record demonstrates that he has a lengthy criminal history, which includes multiple operating while intoxicated and other driving or alcohol-related convictions. And, at time of sentencing, Watkins had several pending unrelated charges. Sent. Tr. p. 42. Even though Watkins has been incarcerated many times, he has continued to re-offend. Moreover, Watkins showed no remorse for his actions, was highly uncooperative and evasive with authorities, and accused another victim of committing the crime. In light of Watkins's repeated disregard for the law and his nominal regard for the safety of others, we reject Watkins's claim that the sentence was inappropriate.

The judgment of the trial court is affirmed.

DARDEN, J., and BRADFORD, J., concur.